

which are not reasonably conclusive and which have practically no connection with the main fact. In the pending defamation suit, whether the respondent had slandered the plaintiff, is the main fact. Evidence of other defamatory statements made of the plaintiff by a third party, for example the appellants, are relevant under this section in showing the probability that the slander was uttered by the third party. But the section does not come into play in the pending suit when a third party has libelled the respondent because that is extraneous to the main fact. Further, the collateral facts are not conclusive as the appellants had categorically denied publishing the defamatory statements on other occasions.

For the above reasons it is difficult to see in what way the appellants can give relevant evidence to assist the defence. In the particular circumstances of this particular case the court has a right to protect them from the practice and process of this court being used simply for a matter that is misconceived and not for the purposes of justice. The appeal is allowed.

Gill J. concurred.

Appeal allowed.

Solicitors: *Koh Kim Leng & Co.; T.T. Rajah.*

RE LEE CHEW KUEN, DECD.

[O.C.J. (Kulasekaram J.) November 20, 1967]

[Singapore — Originating Summons No. 146 of 1967]

Will — Construction of — Testator providing for two eventualities — Presumption arising in case of commorientes — Appointment of wife as executrix if she survives testator for 30 days — Need for construction of will — Intention of testator — Presumption against intestacy — Supplying missing words to make clear the intention of testator.

The testator Lee Chew Kuen preparing to travel to Europe with his wife and two young daughters made a will at a solicitor's office. The plane in which they travelled crashed and all four were killed.

By reason of commorientes the younger are deemed to have survived the elder of them, such situation not being specifically expressed by the will in so many words. It gave rise to two questions regarding construction which were submitted to court for their determination in this Originating Summons, viz., (a) whether the estate of Kittie Chan Wai Hing, widow of the deceased was entitled under the will to a share in his estate, (b) whether estates of the two daughters Dolly Lee and Patricia Lee who died before attaining 21 years of age and unmarried were entitled to any share under the will of the deceased (father).

Held: (1) upon a true construction of the will of Lee Chew Kuen deceased and in the events which have happened, the estate of Kittie Chan Wai Hing, the widow of the said deceased is not entitled to a share in his estate;

(2) upon a true construction of the will of the testator the estates of Dolly Lee and Patricia Lee are not entitled to a share under the will.

A ORIGINATING SUMMONS.

N. A. Mallal for persons interested in arguing that neither the estate of Kittie Chan nor the estates of Dolly Lee and Patricia Lee was or were entitled to a share under the will

B *C. C. Tan* for person interested in arguing that the estates of Dolly Lee and Patricia Lee were entitled to their respective shares under the will.

A. S. Verick (State Counsel) for persons interested in arguing that the estates of Kittie Chan was entitled to a share under the will.

C *Juliet Toh* (Mrs.), for the trustees of the will.

Cur. Adv. Vult.

Kulasekaram J.: In this application two questions regarding the construction of the will of Lee Chew Kuen, deceased, have been submitted to this court for their determination.

D They are:—

(1) Whether upon the true construction of the said will of the abovenamed Lee Chew Kuen, deceased, and in the events which have happened the estate of Kittie Chan Wai Hing, the widow of the said deceased, is entitled under his will to a share in his estate.

(2) Whether upon the true construction of the said will and in the events which have happened the estates of the deceased's two daughters, namely, Dolly Lee Wing Yee and Patricia Lee Yuet Hang, who died before attaining 21 years of age and unmarried, are entitled to any share under the will of the deceased.

Those portions of the will that are relevant to these two questions are paragraphs 2 to 6 of the will and they are as follows:—

G "2. In the event of my wife Kittie Chan Wai Hing surviving me for a period of thirty days from my death I appoint her and John Francis Lancelot Cowin of No. 219 Belmont Road, Singapore, chartered accountant, (hereinafter referred to as "my trustees") to be the executors and trustees of this my will and to be the guardians of my infant children and I give and bequeath to my said wife absolutely all articles and effects of household domestic or personal use ornament or consumption belonging to me and not otherwise specifically bequeathed.

H 2. As to all the rest of my estate and effects of whatsoever nature and wheresoever situate I devise and bequeath the same unto my trustees upon trust to sell call in and convert the same into money with full power to postpone such sale calling in or conversion and out of the moneys to arise from such sale calling in or conversion to pay my funeral and testamentary expenses and debts and to stand possessed of the residue of the said moneys and the investments for the time being representing the same in trust as to one-third (1/3rd.) share thereof for my said wife and as to the remaining two-thirds (2/3rds.) share thereof in trust for each of them my four daughters Dolly Lee Wing Yee, Patricia Lee Yuet Hang, Winnie Lee Voon Ee, Adelaide Lee Lian Seng and my son Arthur Lee King Chi as shall be living at my death and if more than one in equal shares except

that my son the said Arthur Lee King Chi shall take a share treble the amount of the share of each of my daughters but if any of my said children shall then be under the age of twenty-one (21) years then in trust for each of my said children as shall be living until he or she attains the age of twenty-one (21) years or being female marry under that age and if more than one in the same proportion of shares as hereinbefore mentioned.

4. In the event of my wife not surviving me then the following provisions shall have effect.

5. I appoint the said John Francis Lancelot Cowin and Jacob Ballas of 5 Prince Street, Singapore 1, stock broker (hereinafter referred to as "my trustees") to be the executors and trustees of this my will and to be the guardians of my infant children.

6. I devise and bequeath all my property of whatsoever nature and wheresoever situate unto my trustees upon trust to sell call in and convert the same into money with full power to postpone such sale calling in and conversion and out of moneys to arise therefrom to pay my funeral and testamentary expenses and debts and to stand possessed of the residue of the said moneys and the investments for the time being representing the same in trust for my daughters and son named in paragraph 3 hereof for distribution amongst them in the manner and proportions in the same paragraph directed."

It will be observed that two consecutive paragraphs have been numbered "2" and there is no paragraph in the will that is numbered "3" though there is a reference to a paragraph 3 in paragraph 6 of the will. The paragraph immediately following these two paragraphs that have been numbered "2" is numbered "4". It is quite clear that the second of the two paragraphs that have been numbered "2" should have been numbered as "3" and I shall in this judgment refer to this paragraph as paragraph 3.

It might also be convenient here to set out briefly a few facts which are not in dispute and which have some bearing on the two questions now for decision.

- (1) The testator was preparing to travel with his wife to Europe. The testator and wife made mutual wills sometime in June, 1962.
- (2) The testator sought professional advice for making his will and in fact his will was drafted by a skilled solicitor.
- (3) The testator, his wife and his two daughters Dolly Lee and Patricia Lee were on a plane on 7th July, 1962 on their way to Europe when their plane crashed and all of them were killed on the 7th July, 1962 in this tragic air crash.
- (4) As the order of death amongst the four is not known, by presumption of law the testator being the oldest is presumed to have died first, then his wife who is next senior in age and then their two daughters Dolly and Patricia the younger of the two dying last.
- (5) The testator married his wife Kitty Chan on 8th July 1950 and hence Dolly Lee and Patricia Lee at their death on 7th July 1962 were well under 21 years and they were not married.

- A (6) In fact all the five children of the testator mentioned in the will were at the time of his death under 21 years of age and none of them were then married.

B With this broad background let me now consider the first question whether on a true construction of the will of Lee Chew Kuen, deceased, and in the events which have happened, the estate of Kittie Chan, the widow of the testator is entitled under his will to a share in this estate.

C When one looks at this will as a whole and the provisions therein it is more than apparent that the general scheme of the will is in two parts. The first part is contained in paragraphs 2 and 3 of the will. This part begins "In the event of my wife Kittie Chan Wai Hing surviving me for a period of thirty days from my death" The testator goes on to appoint D his wife and J. F. L. Cowin to be the executors and trustees of his will and to be the guardians of his infant children. He bequeaths his personal property, etc. to his wife and gives direction for all the rest to be divided amongst his wife and named children.

E The second or other part of the will begins "In the event of my wife not surviving me" He then appoints J. F. L. Cowin and Jacob Ballas to be the executors and trustees of his will and the guardians of his infant children. He then directs all his property to be divided with certain stipulations amongst his named children.

F Now if, as the will stands, we were to give the ordinary and usual meaning to the words in the will it would appear that the testator has made no provision whatsoever for the event when his wife survives him but dies within thirty days thereafter. Can it be said that the testator did not contemplate this event? This cannot be so G because having specifically provided for the event of his wife surviving him for a period of thirty days, those thirty days after his death is a period of which he is quite aware of. Then in those circumstances if he goes on to provide only for the event of his wife not surviving him, but does H not provide for the event of his wife surviving him but dying within thirty days it can only be explained on the basis that this was done deliberately. One must understand he had also skilled professional advice regarding the drafting of this will. There is nothing wrong in a testator being capricious and not providing for this event. I Do you think he desired an intestacy to his estate to ensue over this period? He has provided guardians to his infant children for both the eventualities for which provision is made in the will. Does it mean that he deliberately did not want to appoint guardians for his infant children in this third eventuality? The whole tenor of the will suggests that this was never his intention.

The whole scheme of the will manifestly displays that the testator wanted to provide for two eventualities only and did in fact contemplate of two eventualities only. He wanted to provide for a specific eventuality and for its alternate eventuality only. It is then that disposition of the testator's estate would be complete. That is why the general scheme of this will is in two parts. On this basis he would either provide for his wife surviving him and the other eventuality of his wife not surviving him or provide for his wife surviving him for at least thirty days and the alternate eventuality of his wife not surviving him for thirty days. There is always a general presumption against intestacy in all such cases.

Now it is quite obvious that the testator contemplated the specific eventuality of his wife surviving him for more than thirty days. The fact that this will was made just a short while before he proceeded on his air trip to Europe, the fact that this will was drafted by a skilled professional man, and all the other surrounding circumstances suggest that the testator quite deliberately was providing for this eventuality. Now, the alternate eventuality to this would be the wife not surviving for thirty days.

So that here is a case where this court in construing this will will read the will with the addition in paragraph 4 of the will after the words "not surviving" the words "for a period of thirty days". In my opinion to read this will without adding these words would be to manifestly disregard the intentions of the testator and act contrary to the intentions of the testator as can be gathered from the general scheme of the will and its context.

With respect, I cannot agree with Mr. Verick's submission that in paragraph 3 of the will the testator also provided therein for the event of his wife surviving him but only for a period of less than thirty days after his death. The opening words of this paragraph are "As to all the rest of my estate and effects. . . ." It is very clear that this paragraph is a continuation of paragraph 2 and the provisions in paragraph 3 only take effect in the event of the testator's wife surviving him for a period of thirty days after his death.

For these reasons I find that upon a true construction of the will of Lee Chew Kuen deceased and in the events which have happened, the estate of Kittie Chan Wai Hing, the widow of the said deceased is not entitled to a share in his estate.

Let me deal with the second question which is whether the estates of the two daughters Dolly Lee and Patricia Lee who died after the testator but before their attaining 21 years are entitled to any share under the will. The relevant portion is paragraph 3 of it. Here we are only concerned with that part of this paragraph which

A relates to the testator's children. The first section of this part referring to the bequests to children is as follows:—

"I devise and bequeath the same unto my trustees upon trust to sell call in and convert the same into money to pay, etc. and to stand possessed of the residue of the said moneys as to the remaining two-thirds share thereof in trust for each of them my four daughters"

B and in the second section there is provision when one or more of the said children are under 21 years at the time of the testator's death.

C Now there can be no doubt whatsoever that if the first section stood by itself without the second section then all of the testator's said children who survived him would take a share of the estate and therefore Dolly Lee and Patricia Lee because they survived the testator would take a share and consequently now the estates of Dolly Lee and Patricia Lee would be entitled to a share in the estate.

D We have next to consider the effect of the provision in the second section of this part of the paragraph. It should be borne in mind that it is the provision in this section that directly affects this question as all the testator's said children were under 21 years of age and unmarried at his death. Mr. Mallal has suggested that this provision should be read as follows:—

- E (1) but if any of the said children shall then be under the age of twenty-one (21) years;
- F (2) then in trust for each of my said children as shall be living until he or she attains the age of twenty-one (21) years or being female marry under that age;
- (3) and if more than one in the same proportion of shares as hereinbefore mentioned.

G If one adopts this reading of this paragraph then only "each of the said children as shall be living until 21 years of age or being female marry under that age" shall be entitled to a share in the estate. Here two conditions will have to be satisfied for them to be entitled to a share in the testator's estate:—

- H (1) they be living at time of the testator's death;
- (2) they reach the age of twenty-one (21) years or being female marry under that age.

I Perhaps here there may be another interpretation, that there is only one condition which is that all the said children who shall live up to 21 years shall be entitled to a share irrespective of whether they were living at the time of the testator's death. I shall deal with this aspect later on.

Mr. Tan has urged that the second section of this part of paragraph 3 of the will should be read thus:—

- (1) but if any of my said children shall then be under the age of twenty-one (21) years;

- (2) then in trust for each of my said children as shall be living;
- (3) until he or she attains the age of twenty-one (21) years or being female marry under that age;
- (4) and if more than one in the same proportion of shares as hereinbefore mentioned.

The effect of this would be that on the death of the testator those of the said children who survive him would take vested interests and the provision "until he attains the age of 21 years or being female marry under that age" merely postpones the passing of the possession of the interests in the gift.

If Mr. Tan is right in his submission then the only difference, in result, between provisions in the first section and second section would be that the beneficiaries would remain the same in both cases but the enjoyment of the gift in the latter case would be postponed until they reach 21 years of age or being female marry under that age. Mr. Tan further submits that the last portion of this proviso, "and if more than one in the same proportion of shares as hereinbefore mentioned", is repeated from the first section and is necessary to ensure that ratio of the division between the daughters and the son is maintained. He submits that if that last section was not included then the division between daughters and son would be on a basis of equality.

I have no hesitation in preferring the construction that Mr. Mallal puts to this paragraph 3 of the will. I take the view that the second section is introduced not to postpone the passing of the possession of the interests but to provide a destination for these gifts under certain eventualities. Here the testator quite clearly contemplates a possible set of beneficiaries which may not be the same as would result from the provisions in the first section. This to my mind more satisfactorily explains the repetition in the second section of the provisions regarding the proportion in which the daughters take in relation to the son. Let me, by way of an illustration, take the case where one of the named children of the testator survives the testator but dies before reaching the age 21 years. It would appear that this child's estate would be entitled to a share in the estate of the testator if the first section of the paragraph stood by itself without the second section but when read with the second section, then this child's estate would not be entitled to a share in the estate of the testator, because he did not live until he attained the age of 21 years.

In the above example this child at the death of the testator may even get a vested interest in the share to which he would be entitled if he lived long enough and attained the age of 21 years but on his death before attaining 21 years of age such vested interest if any would get divested.

A It will be observed here that the destination of the gift to this child is controlled and provided for when the child died without attaining 21 years of age.

B I said earlier that I shall revert to consider the case where the clause "then in trust for each of my said children as shall be living until he or she attains the age of 21 years or being female marry under that age", could be construed as containing only one condition, namely that any of the said children who had lived to the age of 21 years would be entitled to a share in the estate irrespective of whether they were living at the death of the testator or not. It may be said such a construction is possible and this would be inconsistent with the first section for the provision for children where only living children at the testator's death would take a share. Here it has to be borne in mind that when the testator made this will and even at the testator's death (which of course was shortly thereafter) all his named children were all under 21 years and unmarried. In those circumstances if these children will have to reach 21 years they would necessarily be living at the time of the testator's death. So this inconsistency will not occur here. That being so, these considerations here do not affect the views that I had indicated earlier.

E In the result the answer to the second question shall be that upon a true construction of this will the estates of Dolly Lee and Patricia Lee are not entitled to a share under this will.

F I direct that the costs of all parties for this application should be taxed on the higher scale and paid out of the estate of Lee Chew Kuen, deceased.

Order accordingly.

Solicitors: Mallal & Namazie; Tan, Rajah & Cheah; Battenberg & Talma.

GURUBACHAN SINGH v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah & Pawan Ahmad JJ.) November 21, 1967]

H [Penang — Federal Court Criminal Application No. X. 6 of 1967]

Criminal Law and Procedure — Appeal to His Majesty the Yang di-Pertuan Agong — Application for leave to — Courts of Judicature Act, 1964, ss. 64, 65, 66 & 74(1) (b) or (c).

I In an application for leave to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Federal Court ([1967] 2 M.L.J. 220) it was submitted that leave should be given either under paragraph (b) or (c) of section 74(1) of the Courts of Judicature Act:—

Held: (1) leave could not be given under paragraph (b) of section 74(1) of the Act as the judgment appealed from was manifestly "final", and not an "interlocutory judgment or order";